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## Toering Electric: NLRB Holds Job Seekers Need 'Genuine Interest' in Employment For Protection Under National Labor Relations Act

In a significant policy change, the National Labor Relations Board ("Board") recently announced that it will only extend the National Labor Relations Act's ("Act") protections to union job applicants who are "genuinely interested" in obtaining employment. The Board held in *Toering Electric Company*, 351 NLRB No. 18 (slip opinion, September 29, 2007), that (1) "an applicant for employment entitled to protection as a Section 2(3) employee [under the NLRA] is someone *genuinely interested* in seeking to establish an employment relationship with the employer;" and (2) the "General Counsel bears the ultimate burden of proving an individual's genuine interest in seeking to establish an employment relationship with the employer." *Toering*, 351 NLRB No. 18 at 4 (emphasis added).

## Unions' Use of 'Salts'; Risks to Employers Who Fail to Hire Them

Union organizing often involves the practice of "salting," i.e., the act of a union sending professional organizers or union members to an unorganized jobsite or company, with the goal of obtaining employment and then working to organize the company's employees from within. Sometimes, however, a large number of "salts" will apply with the specific goal of having their applications rejected, so that they can then claim that the targeted employer refused to hire them because of its opposition to the union and its supporters. In many such cases, these applications (typically submitted in groups) are accompanied by what the Board has now recognized as "conduct plainly inconsistent with an intent to seek employment" because they are submitted with the intent that they will be rejected once the employer realizes that the applicants are not serious about working for the company, but have actually applied "solely to create a basis for unfair labor practice charges and thereby to inflict substantial litigation costs on the targeted employer."

For many years the NLRB did not accept these realities and, thus, would find that an employer's refusal to extend employment offers in these circumstances constituted an unfair labor practice ("ULP") and that the rejected applicants were entitled to back pay and offers of employment. *Toering* represents a significant policy change because in now recognizing

and accepting these realities, the *Toering* Board has concluded, "[i]n our view, submitting applications with no intention of seeking work but rather to generate meritless unfair labor practice charges is not protected activity." *Id.* at 6-7.

**Facts of Toering Demonstrate Often Abusive Use by Unions of 'Salts'**

The *Toering* case arose after the National President of the International Brotherhood of Electrical Workers ("IBEW") urged local unions to "join him in 'driv[ing] the non-union element out of business'" and take part in the union's salting campaign. *Id.* at 1. The IBEW issued a training manual that addressed traditional organizing techniques and strategies but also placed great emphasis on "the alternative strategy of imposing such costs on a non-union employer as will cause it to scale back its business, leave the salting union's jurisdiction entirely, or go out of business altogether." *Id.* The manual stressed "the filing of unfair labor charges at every opportunity." *Id.* In its decision, the Board noted that such ULP charges served the twin functions of (1) imposing immediate and often substantial expenses on employers forced to defend themselves in legal proceedings; and (2) providing the basis for disruption of the non-union employer's work force and production, often through strikes protesting the unfair labor practice of refusing to hire the salts. *Id.*

Following the urging of the IBEW president, and utilizing the techniques in the training manual, a local union targeted Toering Electric by having a significant number of "salts" submit applications for employment. *Id.* at 2. The company's refusal to hire the union-affiliated applicants led to the filing of a series of ULP charges and, ultimately, to a costly settlement of those charges. As part of the settlement, Toering offered jobs to six union members. Each of the six ultimately declined the offers, and none of them ever came to work for Toering. Toering also paid back-pay to a number of the other union applicants. *Id.*

Two years later, the union again targeted Toering, and submitted another batch of members' resumes in response to the company's help-wanted ads. Among the resumes the union submitted, five contained no dates of employment in the work history, five were stale, and one belonged to a union member who previously had refused the job offer Toering made to him as part of the earlier ULP settlement. *Id.* Toering did not extend offers to any of the applicants in this second "salting" effort. Id. The union, in turn, filed a new round of ULP charges and the company defended its hiring decisions on the ground that none of those applicants who submitted resumes were "genuinely interested in seeking employment and thus were not entitled to statutory protection." *Id.* at 3.

**Board Limits Protections, Places Burden of Proof on General Counsel**

The Board's Regional Director issued a complaint, and the case went to trial. The Administrative Law Judge who heard the case ruled against Toering and found that it had unlawfully refused to hire the applicants because of their support for the union. On appeal, the full Board reversed, and announced that only applicants who are genuinely interested in employment are employees entitled to protection under Section 2(3) of the Act. As part of its rationale in reaching this holding, the Board found it was necessary "to allay reasonable concerns that the Board's processes can be too easily used for the private, partisan purpose of inflicting substantial economic injury on targeted nonunion employers rather than for the public, statutory purpose of preventing unfair labor practices that disrupt the flow of commerce." *Id.* at 4. In so holding, the Board recognized that the relationship between an employer and a putative job applicant who has no genuine interest in working for that employer "is not the economic relationship contemplated and protected by the Act." *Id.* For these reasons, the Board decided to "abandon [its previous] implicit presumption that anyone who applies for a job is protected as a Section 2(3) employee." *Id.* at 7.

In another significant change, the Board in *Toering*, expressly placed the burden of proving that an applicant has a "genuine" interest in obtaining employment upon the Board's General Counsel. The Board recognized that "[h]iring discrimination under the Act simply cannot occur unless the individual actually was seeking an employment opportunity with the employer." *Id*. at 8.

To meet this burden, the General Counsel must establish two elements, *i.e*., that "(1) there was an application for employment, and (2) the application reflected a genuine interest in becoming employed by the employer." *Id*. at 9. Once the General Counsel has shown that the alleged discriminatee applied for employment, the employer may rebut the genuineness of the application with evidence that the applicant (1) refused similar employment with the employer in the past; (2) incorporated offensive comments on his or her application; (3) engaged in disruptive, insulting, or antagonistic behavior during the application process; or (4) engaged in other conduct inconsistent with a genuine interest in employment. *Id*. Once the employer produces such evidence, the General Counsel then bears the burden of proving by a preponderance of the evidence that the applicant in question was genuinely interested in seeking to establish an employment relationship. That is, "the ultimate burden of proof" rests with the General Counsel. *Id*.

Taken as a whole, *Toering* represents a major change from precedent and provides some measure of relief for employers who have been targeted for organizing by unions. Because of the *Toering* decision, salting may become a less attractive technique for unions that use mass applications to inundate employers with applicants in an attempt to organize them or draw them into expensive and protracted litigation. Now, if employers resist union salting efforts, the *Toering* decision provides them additional means to probe the sincerity of an applicant's interest in employment and to avoid potential back pay liability to those who sought something less than a genuine employment opportunity.

Perhaps more importantly, this case demonstrates the vital significance in any hiring decision that the applicant's true interest in the position be ascertained. After all, if an applicant is not "genuinely interested" in employment, he or she will not enjoy the Act's full protections. The challenge, of course, remains for an employer to make these judgments without crossing into prohibited inquiries regarding union activities and sympathies.

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If you have any questions regarding this new development or related matters, please contact Steve Swirsky at (212) 351-4640 or sswirsky@ebglaw.com at Epstein Becker & Green's New York office, or James Michalski at (310) 557-9534 or jmichalski@ebglaw.com at the firm's Los Angeles office.